

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENDRICK FRANK RICHARD,

Defendant-Appellant.

UNPUBLISHED

March 10, 2005

No. 251330

Oakland Circuit Court

LC No. 00-175159-FC

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court for consideration as on leave granted. *People v Richard*, 469 Mich 918; 673 NW2d 105 (2003). Defendant pleaded nolo contendere to assault with intent to do great bodily harm less than murder, MCL 750.84, and open murder. After a bench trial to determine the applicable degree of murder, the court found defendant guilty of second-degree murder, MCL 750.317, for the beating death of Gary Davis. The trial court sentenced defendant to concurrent prison terms of thirty to sixty years for the murder conviction and three to ten years for the assault conviction. We affirm.

Defendant first argues that the trial court abused its discretion in admitting a crime scene photograph depicting the victim's badly beaten body. We disagree. This issue is reviewed for an abuse of discretion. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998).

The admission of a gruesome or graphic photograph for the purpose of arousing the jury's sympathies and prejudices can constitute error that requires reversal. *Id.* at 188. "However, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime." *Id.* Moreover, our Supreme Court in *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995), noted that the ability of a witness to testify regarding the scene depicted in a photograph does not in itself justify the photograph's exclusion. Additionally, a photograph may be admitted to corroborate witness testimony. *Id.*

The trial court did not abuse its discretion in admitting the photograph. While defendant pleaded nolo contendere to the assault and open murder charges, the prosecutor still was attempting to prove the elements of first-degree murder. Thus, defendant's intent was at issue, and regarding first-degree murder, the court had to determine whether defendant had an intent to kill and whether he acted with premeditation and deliberation. *People v Anderson*, 209 Mich

App 527, 537; 531 NW2d 780 (1995). “The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing.” *Id.*

The one photograph admitted in this case depicted the severity of the victim’s injuries and was, therefore, consequential to determining defendant’s intent. *Mills, supra* at 71. Moreover, the photograph corroborated the testimony of the forensic pathologist and the victim’s landlord, who observed the body’s condition. Thus, it was probative of the witnesses’ credibility. *Id.* at 72-73. Further, we are mindful that this case involves a bench trial, and a trial court, sitting as a trier of fact, is presumed to understand the law and give *appropriate* consideration to the evidence and testimony introduced. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55, lv den 465 Mich 893 (2001). We find no error with respect to the admission of the photograph.

Defendant next argues that the trial court abused its discretion and imposed an unconstitutionally severe sentence in departing from the sentencing guidelines. We disagree. We review this issue for an abuse of discretion. *People v Babcock*, 469 Mich 247, 268-269; 666 NW2d 231 (2003).

Generally, a court is required to impose a sentence in accordance with the guidelines established by the sentencing guidelines act. MCL 769.34(2). However, factors that are objective and verifiable can serve as the basis for departing from the guidelines. MCL 769.34(3); *Babcock, supra*, 469 Mich 256-258. These factors must be “substantial and compelling,” i.e., they must “keenly or irresistibly grab [the Court’s] attention” and be “of considerable worth.” *Babcock, supra* at 258 (internal citations and quotations omitted).

We agree with the prosecution that the trial court erred in its scoring of offense variable (OV) 7, which provides that fifty points should be assessed if “[a] victim was treated with terrorism, sadism, torture, or excessive brutality[.]” MCL 777.37(1)(a). The court scored zero points on this variable, while basing its departure on the severity of the beating that killed the victim. If the court had properly scored this variable, defendant’s total OV score would have been 141, putting him at level III. The minimum sentence for the offense in question for an offender with an OV level III and a prior record variable level C is 225 to 375 months or life. MCL 777.61. Defendant’s sentence was within *this* range. Thus, we are satisfied that defendant’s sentence was within the principled range of outcomes because, if OV 7 had been properly scored, defendant’s sentence would have been within the guidelines. Likewise, we view this situation as providing a substantial and compelling reason for the trial court’s departure from its scoring of the sentencing guidelines.

With regard to defendant’s argument that the sentence at issue constituted cruel or unusual punishment under the state and federal constitutions,¹ his sentence did not violate those constitutional protections because the sentence would fall within the properly scored sentencing guidelines range. See *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004)

¹ See US Const, Am VIII (prohibition against cruel and unusual punishment) and Const 1963, art 1, § 16 (prohibition against cruel or unusual punishment).

(holding a challenge to a sentence under the constitutional prohibitions against cruel or unusual punishment to be “without merit” because the sentence was within the sentencing guidelines range). Further, “a proportionate sentence does not constitute cruel or unusual punishment.” *Id.* at 92. Defendant’s sentence for second-degree murder was not disproportionate given the circumstances of this case, involving the brutal beating death of the victim.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello